Supreme Court, U. S.
FILED
NOV 28 1980
MICHAEL RODAK, JR., CLERK

No. 80-865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOAN HARRIS
and
MARY K. STINE,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Frank E. Brown, Jr.
(Counsel of record)
Barham, Radigan, Suiters & Brown, P.C.
2009 North 14th Street
Arlington, VA 22216
(703) 841-0011
Counsel for Petitioners

November 26, 1980

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

QUESTION PRESENTED

When private individuals, not acting under color of state law, are charged with criminal trespass, does *Roe v. Wade's* holding that, under specified conditions, a *state* may not attempt to prevent first trimester abortions force a trial court to deny the accused the right to even raise defenses which would be available in any other criminal trespass case merely because the trespass in question occurred at an abortion clinic?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... (i)

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES 2-3

STATEMENT 3-5

REASONS FOR GRANTING THE WRIT 5-11

1. The common law doctrine of necessity is available as a defense to a charge of criminal trespass, and neither the situs of the trespass nor the legality of the use of the premises has heretofore been relevant as regards the right to raise the defense; when a trial court rules that this Court has forbidden an accused to defend himself merely because the trespass involved an abortion protest, only this Court can restore the constitutional right to defendant 6-9

2. That confusion and unequal justice will continue unless this Court provides guidance is not mere speculation; the acts committed by these defendants are criminal in the City of Alexandria, but not in the adjacent County of Fairfax. Protests against abortion continue across the country, and equal justice cannot be administered by trial courts forced to speculate as to the effect of *Roe v. Wade* on the rights of those charged with criminal trespass 9-10

3. Allowing Harris and Stine their constitutional right to defend against a criminal charge in no way diminishes the right of a property owner to prohibit interference with lawful use of his property 10-11

CONCLUSION 12

PREVIOUS PAGE WAS BLANK

Page

APPENDIX 1a-12a

Order of the Supreme Court of Virginia 1a

Motion *In Limine* to Exclude Defendants' Evidence of Fetal Life and the Defense of Necessity 2a-3a

Order Granting Commonwealth's *Motion In Limine* to Exclude Defendants' Evidence of Fetal Life and the Defense of Necessity 4a

Assignment of Error No. 1 from Petition for Appeal to the Supreme Court of Virginia 5a

Stipulation of Facts 6a-8a

Opinion of the Court in *County of Fairfax v. Gaetano*, et al. 9a-12a

TABLE OF AUTHORITIES

Cases

Brown v. Commonwealth,
86 Va. 466, 10 S.E. 745 (1890) ..... 7(fn2)

Doe v. Bolton,
410 U.S. 179 ..... 4, 5

Fortune v. Commonwealth,
133 Va. 669, 112 S.E. 861 (1922) ..... 7(fn2)

Harper v. Commonwealth,
196 Va. 723, 85 S.E.2d 249 (1955) ..... 7(fn2)

McGhee v. Commonwealth,
219 Va. 560, 248 S.E.2d 808 (1978) ..... 7(fn2), 8

Newcomer v. Commonwealth,
220 Va. 64, 255 S.E.2d 485 (1979) ..... 7(fn2)

Page

Roe v. Wade,
410 U.S. 113 ..... 3, 5, 6, 8, 9

State v. Gorham,
110 Wash. 330, 188 Pac. 457 (1920) ..... 7(fn1)

State v. Hoyt,
21 Wis.2d 284, 128 N.W.2d 645 (1964) ..... 7(fn1)

State v. Jackson,
71 N.H. 522, 53 Atl. 1021 (1902) ..... 7(fn1), 10

State v. Ward,
170 Iowa 185, 152 N.W. 501 (1915) ..... 7(fn1)

Stoneman v. Commonwealth,
66 Va. (25 Gatt.) 599 (1874) ..... 7(fn2)

Taylor v. Commonwealth,
185 Va. 224, 38 S.E.2d 440 (1946) ..... 7(fn2)

United States v. Ashton,
Fed. Cas. No. 1470 ..... 7(fn2)

Constitutional Provisions

Constitution of the United States, Amendment XIV 2, 4, 11

Statutes

§ 18.2-72, 1950 Code of Virginia, as amended 4

§ 18.2-119, 1950 Code of Virginia, as amended 2, 3, 4

28 U.S.C. § 1253(3) 2

Other Authorities

1 Wharton, Criminal Law (18th ed.) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

JOAN HARRIS
and
MARY K. STINE,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners, Joan Harris and Mary K. Stine (hereinafter "Harris and Stine"), pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Virginia entered in the above entitled case on October 1, 1980, which judgment refused Harris and Stine's Petition for Appeal. Citations to the Appendix of this Petition will be indicated by [p. __a].

OPINIONS BELOW

No opinions were written by either the trial court or the Supreme Court of Virginia.

JURISDICTION

Harris and Stine were convicted of criminal trespass in the Circuit Court of the City of Alexandria, Virginia on February 6, 1980. The Order of the Supreme Court of Virginia, refusing the Petition for Appeal, was entered October 1, 1980 [p. 1a]. The federal question involves a denial of due process under the United States Constitution, Amendment 14. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV, Section 1:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 18.2-119, 1950 Code of Virginia, as amended:

> **"Trespass after having been forbidden to do so.** — If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion of area thereof at a place or places

> where it or they may be reasonably seen, he shall be guilty of a Class 1 misdemeanor. This section shall not be construed to affect in any way the provisions of §§ 18.2-132 through 18.2-136, and §§ 29-169 and 29-170 of this Code."

STATEMENT

It is the denial of the right to defend a criminal charge, and not the legality or morality of abortion, which is the subject of this case.

On February 6, 1980, Harris and Stine were each convicted of criminal trespass under Virginia's "trespass to realty" statute, *supra,* p. 2, for refusing to leave the premises of the Alexandria Women's Clinic (hereinafter "Clinic") when requested to do so by the assistant administrator. Their intrusion was for the purpose of protesting and attempting to prevent the two to sixteen abortions being carried out daily at the Clinic and of disseminating factual information to clients and prospective clients of the Clinic. It has been stipulated that they may have been successful in their attempts to prevent abortions [Stipulation, p. 6a].

Harris and Stine raised the defense that the trespass was justified and legally excused under the common law doctrine of necessity and defense of another, as they had a reasonable belief that human life exists during the first trimester of pregnancy. They made it known that they intended to introduce evidence which would show the reasonableness of this belief.

The Commonwealth filed a "Motion *in limine* to Exclude Defendants' Evidence of Fetal Life and the Defense of Necessity." The grounds of this Motion were:

> "Because the United States Supreme Court has permitted first trimester abortions (See *Roe v.*

> *Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 141 (1973) and *Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed. 201 (1973)) and the law of the Commonwealth permits such abortions (See § 18.2-72, Code of Virginia (1950), as amended) the defense of necessity is not applicable.
>
> Therefore, even if the defendants' beliefs regarding the inception of human life are true, they are nevertheless irrelevant as a matter of law in regard to this offense of trespass in violation of § 18.2-119 Code of Virginia (1950), as amended. Consequently, the sole purpose and result of attempting to introduce the aforementioned evidence would be to inflame the passions of the jury and distract the members of the jury from considering relevant evidence pertaining to the issues properly in controversy." [p. 3a].

In arguing against the Motion *in limine,* Harris and Stine contended that the granting of the Motion would deprive them of the fair trial guaranteed by due process. In their Petition for Appeal, Assignment of Error No. 1, Harris and Stine again raised the federal constitutional question by specifically contending that denying them the right to present the defense of necessity and other related defenses, and excluding all evidence relating to such defenses, deprived them of a fair trial in violation of the 14th Amendment to the Constitution of the United States [p. 5a].

By Order entered January 24, 1980 [p. 4a] the trial court granted the Commonwealth's Motion *in limine* and forbade Harris and Stine to present the defense of necessity or introduce any evidence in support thereof. The Commonwealth did not suggest that Harris and Stine's arguments did not correctly state Virginia law or that the evidence proffered would not support the defense and the trial court did

not so rule. No ruling whatever was made as regards the merits of the defense. Rather, the trial court held that this Court, by its rulings in *Roe v. Wade,* 410 U.S. 113, and *Doe v. Bolton,* 410 U.S. 179, has decided that individuals are denied the right to even raise the doctrine of necessity as a defense to a criminal trespass charge if the trespass happens to have occurred at an abortion clinic.

REASONS FOR GRANTING THE WRIT

The issue presented by this case far transcends the future of the two women immediately involved and is infinitely more disturbing in its implications than even the serious fact that Harris and Stine now have a criminal record.

That issue concerns a state trial court's assumption of unreviewble power to affect and alter basic constitutional rights in a manner contrary to the standards established by this Court.

In states such as Virginia, in which these Defendants have no appeal of right, the trial court, as a practical matter, possesses unreviewable power to shape and interpret the United States Constitution as it affects the rights of those accused of a crime. Here, the trial court held that one effect of *Roe v. Wade* was to deprive an accused of certain defenses, available in any other criminal trespass case, simply because the trespass occurred at an abortion clinic.

Clearly, denial of the right to defend a criminal charge involves a constitutional question of the first magnitude.

Clearly, it is plain error to hold that *Roe v. Wade* requires a trial court to deny these accused the right to raise a defense.

Not only did *Roe v. Wade* not, in fact, deal with the rights of those being prosecuted for protesting and attempting to prevent abortions, it constitutionally could not attempt to regulate the actions of private individuals not acting under color of state law. Harris and Stine's conduct was only subject to regulation by Virginia. Just as they could be held to answer for an alleged violation of Virginia law, so were they entitled to raise all defenses recognized by Virginia law.

The question of constitutional law here presented has not, but should be, settled by this Court. Harris and Stine, with no appeal to the Virgina courts, can only seek the aid of this Court, in whose name they were silenced, in restoring the constitutional right of an accused to defend a criminal charge.

1. The common law doctrine of necessity is available as a defense to a charge of criminal trespass, and neither the situs of the trespass nor the legality of the use of the premises has heretofore been relevant as regards the right to raise the defense; when a trial court rules that this Court has forbidden an accused to defend himself merely because the trespass involved an abortion protest, only this Court can restore the constitutional right to defend.

Firmly entrenched in the jurisprudence of all common law jurisdictions, including Virginia, is the defense of necessity, or defense of another. "Under the force of extreme circumstances, conduct which would otherwise constitute a crime is justifiable and not criminal; the actor engages in the conduct out of necessity to prevent a greater harm from occurring." 1 Wharton, *Criminal Law,* § 88, p.

409 (18th ed.).[1] Under Virginia law, conduct otherwise criminal is excused if the defendant had an honest apprehension of immediate danger which he sought to prevent, even if the danger was, in fact, unreal. The test is not what a reasonable man would believe, but what the defendant reasonably actually believed.[2] No Virginia decision has ever limited the class of cases to which the defense of necessity applies, nor has there been any decision which precludes the defense merely because the activity being conducted at the place of the trespass is legal. The defense would clearly apply, for example, if an individual trespassed on posted property in the reasonable belief that it was necessary to save a child in danger of falling into a pond and drowning, even if the danger was, in fact, unreal and no illegal activity was being conducted on the property. One need only refer to the law of public nuisance to know

---

[1]A person may lawfully enter upon another's premises in the interest of preservation of human life, and trespass will be legally excused or justified [*State v. Hoyt,* 21 Wis.2d 284, 128 N.W.2d 645 (1964)]. Wharton refers to cases where: a ship's crew was justified in revolting and returning to port because the vessel was unseaworthy [*U.S. v. Ashton,* Fed. Cas. No. 1470]; a parent could withdraw a child from school in violation of the State law because of the child's ill health [*State v. Jackson,* 71 N.H. 552, 53 Atl. 1021 (1902).]; a person could kill animals in violation of the game laws in order to protect his property [*State v. Ward,* 170 Iowa 185, 152 N.W. 501 (1915)]; a person is justified in violating speeding laws in order to apprehend a fleeing felon [*State v. Gorham,* 110 Wash. 330, 188 Pac. 457 (1920)].

[2]*Newcomer v. Commonwealth,* 220 Va. 64, 73, 255 S.E.2d 485, 491 (1979); *McGhee v. Commonwealth,* 219 Va. 560, 562, 248 S.E.2d 808, 810 (1978); *Harper v. Commonwealth,* 196 Va. 723, 731, 85 S.E.2d 249, 254 (1955); *Taylor v. Commonwealth,* 185 Va. 224, 227, 38 S.E.2d 440, 442 (1946); *Fortune v. Commonwealth,* 133 Va. 669, 112 S.E. 861, 868 (1922); *Brown v. Commonwealth,* 86 Va. 466, 10 S.E. 745 (1890); *Stoneman v. Commonwealth,* 66 Va. (25 Gratt.) 599 (1874). Virtually all Virginia decisions which establish the general principles applicable to the defense of necessity involve a claim of justifiable killing in self defense. They would apply with greater force to a claim of mere justifiable trespass.

that interference with a lawful activity does not deprive an individual of the right to defend a criminal charge.

> "A defendant may always act upon reasonable appearance of danger, and whether the danger is reasonably apparent is always to be determined from the point of the defendant at the time he acted. These ancient and well-established principles have been recited to emphasize the subjective nature of the defense, . . .". *McGhee v. Commonwealth,* 219 Va. 560, 562, 248 S.E.2d 808, 810 (1978).

Harris and Stine's defense was based upon their reasonable belief that human life begins during the first trimester of pregnancy; hence their trespass was legally justified in an effort to save human lives. The proffered evidence was for the purpose of showing the reasonableness of the belief. The trial court did not rule that Harris and Stine did not correctly state the elements of the defense under Virginia law or that the proffered evidence could not, as a matter of law, sustain those elements. It merely ruled that this Court, in *Roe v. Wade,* had eliminated the defense in cases involving trespass on premises where abortions were being conducted.

Harris and Stine do not ask this Court to determine the elements of the defense of necessity under Virginia law or whether the proffered evidence would establish those elements. The short summary of Virginia law is set out merely to show that the defense is well recognized in Virginia and is not specious.

Harris and Stine do not ask this Court, or the trial court, to reexamine the holding of *Roe v. Wade.*

Harris and Stine do not ask this Court to determine when life begins, nor would the trial court or the jury be

forced to make that determination. Under the doctrine of necessity, the trier of fact is asked to find whether, under the evidence, the defendants' belief was honest and reasonable, not whether the defendants belief is a proven fact.

This Petition is confined to the narrow question of whether this Court has ruled that trial courts must deny defendants the right to raise defenses, available in any other criminal trespass case, if the trespass occurs at an abortion clinic. Only this Court can provide the answer.

2. That confusion and unequal justice will continue unless this Court provides guidance is not mere speculation; the acts committed by these defendants are criminal in the City of Alexandria, but not in the adjacent County of Fairfax. Protests against abortion continue across the country, and equal justice cannot be administered by trial courts forced to speculate as to the effect of *Roe v. Wade* on the rights of those charged with criminal trespass.

Of course, Harris and Stine have no way of ascertaining in how many unreported cases across the country this question has arisen or how it has been resolved. They cannot convince this Court to grant certiorari by proving, with numerous citations, widespread confusion and injustice. However, it is not speculation that there is confusion and unequal justice in adjacent jurisdictions in Virginia. On October 17, 1977, the Honorable Lewis H. Griffith, Judge of the General District Court of Fairfax County, now Judge of the Circuit Court of Fairfax County, ruled that defendants charged with criminal trespass for protesting at an abortion clinic would be allowed to present the defense of necessity and offer evidenced as to

the reasonableness of their beliefs that human life begins during the first trimester of pregnancy. After hearing evidence and argument on the defense of necessity, charges against all six defendants were dismissed [p. 10a]. In the adjacent City of Alexandria, defendants charged with the same crime, under the same facts, are required to remain silent and are not even allowed to raise the defense.

It is too extravagant to maintain that such denial of equal protection is merely an isolated instance. As this Court is well aware, protests against abortion continue throughout the country, and protesters continue to be prosecuted for trespass. Since individuals have a constitutionally protected right to protest, it is imperative that this Court clearly define the line at which their conduct becomes criminal.

Harris and Stine do not ask this Court to direct an acquittal. They merely ask that the Circuit Court of the City of Alexandria be directed to allow them to defend themselves, utilizing the defense of necessity, and that "upon this question of reasonable necessity, [they will] be entitled to a judgment of [their] peers." *State v. Jackson,* 71 N.H. 552, 53 Atl. 1021, 1023 (1902).

3. Allowing Harris and Stine their constitutional right to defend against a criminal charge in no way diminishes the right of a property owner to prohibit interference with lawful use of his property.

Whatever the positions of the various parties on the merits of this case, the wrong which Harris and Stine perceived and sought to prevent clearly involved an immediate danger and peril. The Clinic performs between two and sixteen abortions during each day of operation [Stipulation, p. 6a] and abortions cannot be undone. The

Stipulation shows that the defense proffered could not be ruled frivolous or specious as a matter of law and, in fact, trial court did not so rule.

Even assuming, *arguendo,* that the Clinic operates within the law, it is not anomolous or inconsistent that Harris and Stine should be acquitted of a charge of criminal trespass for disrupting its operation. This case does not reach the question of whether the Clinic could obtain a civil injuction, with sanctions for its violation, whether the Virginia General Assembly could abolish the defense of necessity in cases involving the operation of an abortion clinic or whether police officers may be properly used to remove protesters. The civil law provides a complete and adequate remedy for protection of a property owner from interference with the conduct of lawful activity. Having chosen to proceed through the criminal process, neither the clinic nor the Commonwealth is free to fashion a hybrid remedy by excluding a defense to a criminal charge which might be properly excludable in a civil action.

The sole, narrow question in this case is whether Harris and Stine have committed a *crime.* The fact is, at the present time, the defense of necessity is available in all criminal cases in Virginia without restriction or limitation. The question is not whether the defense will ultimately prevail. The issue is the right of the individual to raise and be heard on the defense. It is for a jury to decide, after hearing all of the evidence, whether Harris and Stine's conduct was criminal.

CONCLUSION

Evidence and entire defenses may not be denied those charged with a crime unless the defense has been clearly precluded by pre-existing law or a proffer shows that the defense is frivolous as a matter of law. Neither situation obtains here. The denial of the right to defend this criminal charge violated Harris' and Stine's right to a fair trial and denied them due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States. For the foregoing reasons, this petition for a write of certiorari should be granted, and Harris and Stine should be granted a new trial and allowed to present the defense of necessity and receive the judgment of their peers.

Respectfully submitted,

Frank E. Brown, Jr.
Barham, Radigan, Suiters
& Brown, P.C.
2009 North 14th Street
Arlington, VA 22216
(703) 841-0011
Counsel for Petitioners

November 26, 1980

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 1st day of October, 1980.

Joan McDaniel Harris and
Mary Kathleen Stine, Appellants,

against Record No. 800675
Circuit Court Nos. M-4791 and M-4792

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Alexandria

Finding no reversible error in the judgments complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: /s/ [illegible]
Deputy Clerk

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

COMMONWEALTH OF VIRGINIA

v. M - 4791

JOHN HARRIS
Defendant

COMMONWEALTH OF VIRGINIA

v. M-4792

MARY K. STINE,
Defendant

MOTION IN LIMINE
TO EXCLUDE DEFENDANTS' EVIDENCE OF
FETAL LIFE AND THE DEFENSE OF NECESSITY

COMES NOW the Commonwealth, by its Attorney, and moves this Court to exclude evidence to be proffered by the defendants as to the existence and inception of fetal life, and thd [sic] defense of necessity during the trial of the above styled matters now scheduled for trial on February 6, 1980 with a jury for the resaons hereinbelow set forth, to-wit:

1. The defendants, and others, were arrested and charged with trespassing in violation of § 18.2-119, Code of Virginia (1950), as amended during an incident at the Alexandria Women's Clinic in Alexandria on September 15, 1979.

2. The Alexandria Women's Clinic is a medical facility providing a variety of gynecological services including, *inter alia,* first trimester abortions consistent with Virginia law.

3. The Commonwealth has reason to believe that the defendant will attempt to introduce evidence before the jury that human life begins at the moment of conception, and that the resultant fetus is a human being as a matter of scientific fact. Further, it is believed that the defendants will attempt to provide testimony, before the jury, of a physician, a clergyman, and a pregnant women [sic], and demonstrative evidence consisting of magazine articles, photographs, motion pictures and photographic slides, all for the purpose of showing that life begins at conception and that the fetus is a human being.

4. Because the United States Supreme Court has permitted first trimester abortions (See *Roe v. Wade,* 410 U.S. 13, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) and *Doe v. Bolton,* 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 201 (1973)) and the law of the Commonwealth permits such abortions (See § 18.2-72, Code of Virginia (1950), as amended) the defense of necessity is not applicable.

5. Therefore, even if the defendants' beliefs regarding the inception of human life are true, they are nevertheless irrelevant as a matter of law in regard to this offense of trespass in violation of § 18.2-119 Code of Virginia (1950), as amended. Consequently, the sole purpose and result of attempting to introduce the aforementioned evidence would be to inflame the passions of the jury and distract the members of the jury from considering relevant evidence pertaining to the issue properly in controversy.

WHEREFORE, the Commonwealth prays that the said Motion be granted.

Respectfully submitted,

/s/ Richard S. Mendelson
Richard S. Mendelson
Asst. Commonwealth's Attorney

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

[Caption omitted in printing]

ORDER

THIS CAUSE came on this day upon Motion of the Commonwealth, by its attorney, *in limine* to exclude the defendants' evidence of fetal life and the defense of "necessity" during the trial of the above styled matters; and

IT APPEARING to the Court, after hearing the argument and due consideration of the issues presented, that the said Motion *in limine* should be granted; it is

ORDERED that the following shall be excluded from, and be inadmissable as evidence during the trial of the above styled matters:

1. Testimony and exhibits tending to show that human life begins at the moment of conception and that human fetuses are human beings or "persons."

2. The presentation of a defense to the offense of trespass based upon the necessity of going upon the property of another in order to prevent the performing of abortions during the first trimester of pregnancy pursuant to § 18.2-72 Code of Virginia (1950), as amended.

ENTERED this 24th day of January, 1980.

/ s / DONALD H. KENT
Judge

APPENDIX C

ASSIGNMENT OF ERROR NO. 1 FROM PETITON FOR APPEAL TO THE SUPREME COURT OF VIRGINIA IN JOAN McDANIEL HARRIS AND MARY KATHLEEN STINE v. COMMONWEALTH OF VIRGINIA, RECORD NO. 800675

1. The Court erred in granting the Commonwealth's motion *in limine* which denied Defendants the right to present the defense of necessity and other related defenses and excluded all evidence relating to such defenses, depriving Defendants of a fair trial in violation of Amendments V, VI and XIV of the Constitution of the United States and Sections 8 and 11 of the Constitution of Virginia.

* * *

APPENDIX D

STIPULATION OF FACTS IN COMMONWEALTH OF VIRGINIA v. JOAN HARRIS AND MARY K. STINE, CIRCUIT COURT OF THE CITY OF ALEXANDRIA, NOS. M-4791 & M-4792

On September 15, 1979, at about 8:30 A.M., the defendants, JOAN HARRIS and MARY KAY STINE, together with several other persons, entered Landmark Towers, a high-rise building located at 101 South Whiting Street, Alexandria. They entered suite 215 which was the office complex of the Alexandria Women's Clinic.

Upon arriving at the Clinic, the defendants and others with them were located in the waiting room, at the elevator door on the second floor, in the hallway outside the Clinic's door and within the corridors of the clinic's suite. One of the group's members read a statement at the receptionist's window expressing opposition to abortion. The clinic performs between two and sixteen abortions each day of operation.

Shortly thereafter, Alexandria police officers arrived on the scene. Officer Tazelaar found the defendants and others with them in the process of singing and reading aloud, while others in the group blocked the entrance to the operating rooms. The uniformed officers began consultations with Lt. Callahan and Captain Johnson of the police department.

At 10:00 A.M., Lois Johnson, assistant administrator of the clinic, asked each member of the group, including the defendants, to leave the premises of the clinic. The verbal request was made to each member of the group in the presence of one of the police officers. Each member of the group, including the defendants, was issued a summons which charged that each has violated § 18.2-119, Code of Virginia (1950), as amended, by trespassing. Then the

waiting room was cleared by police officers physically removing the protestors who offered "passive resistance." Subsequently, the hallway was cleared in a similar fashion.

Had the Commonwealth's motion *in limine* not been granted (See order entered January 24, 1980, by Judge Kent in the above-styled matter), the defendants would have produced evidence consisting of expert testimony, motion pictures, and other forms of demonstrative evidence all of which would show that human life begins at the moment of conception and that human life exists during the first trimester of pregnancy. Further, the defendants would have elicited testimony that the Alexandria Women's Clinic provides various types of gynecological services, including abortions, to women. The defendants would have contended that because abortions are acts which destroy human fetuses and that fetuses are, the defendants believe, human beings in existence, abortions amount to the destruction of human life. The defendants' intrusion at the clinic may have disrupted the usual course of business on September 15, 1979, thereby preventing abortions during the hours of the demonstration. Also, patients of the clinic who had occasion to witness the defendants and their confederates may have been dissuaded from carrying out abortions of fetuses with which they were pregnant. Defendants would have testified that after counselling during the "sit-in", at least two patients left the premises without having had abortions that day. Consequently, the defendants believe that they were compelled, by necessity, and in defense of others, to intrude into the premises of the clinic, and refuse to leave after having been forbidden by the clinic's agent to remain, in order to possibly prevent the destruction of human life.

The foregoing STIPULATION OF FACTS is in accord with our understanding of the events which led to the defendants having been charged with the offense of

trespass in violation of § 18.2-119, Code of Virginia (1950), as amended, and the position of the defendants in relation to the offenses charged against them.

/s/
Richard S. Mendelson
Assistant Commonwealth's Attorney

/s/
Joan Harris, Defendant

/ s /
Charles McDonnell Radigan
Counsel for Defendants

/ s /
Mary Kay Stine, Defendant

/s/
John E. Kilcar
Counsel for Defendants

APPENDIX E

TRANSCRIPT OF RULING OF THE COURT IN COUNTY OF FAIRFAX v. DAVID GAETANO, et al., GENERAL DISTRICT COURT OF FAIRFAX COUNTY, THE HONORABLE LEWIS H. GRIFFITH PRESIDING, OCTOBER 17, 1977

For the benefit of everyone who is concerned with the outcome of this case, the defendants, their respective counsel and so forth, let me also express my appreciation to Mr. Merril on behalf of the Commonwealth Attorney and certainly counsel for each of the defendants in the manner in which this matter has been presented to the Court.

It, of course, is a responsibility of the Court, since each of the defendants is charged with a criminal offense, to determine if the Commonwealth has indeed proved their case beyond a reasonable doubt. It's the understanding of this Court that the law as it exists in Virginia is if there is any hypothesis of innocence then indeed that must be determined in behalf of the defendant as such.

With respect to the testimony and the evidence, I couldn't agree more than I do with one Mr. Merril's arguments that every individual in this room I think was telling what he believed to be the factual situation at that time.

Mrs. McCann was in a situation of distress because she saw it. Certainly, the individuals who were there for the purposes that they have testified to the Court that they were there for were also in a position of distress. I don't expect them to recall point by point and item for item the events which occurred as such.

Let me say one other general thing. I think that the argument on behalf of the defendants has made it very clear and certainly should be understood by everyone who

is interested in this case that I am bound by the law in determining the case. I am bound by the facts which have been presented to me in this particular case. There should be no interpretation that my ruling in this particular case governs any other situation which has not been presented to me at this particular time.

With respect to the issue of whether a trespass occurred as each of the individuals is charged as such, I am of the opinion from hearing the testimony and evidence that the individuals did go to the clinic on May 14. I know why they went there. I think that they were told by Mrs. McCann generally if not individually to leave. I think she was in a position of authority to tell them and to require them to leave as such.

I think that when they did refuse to leave, she, with the assistance of the police officer, had them removed from the premises as such. And so I find that there was indeed a trespass on behalf of each of the individuals who were charged at this particular time.

The second issue with respect to the actions of the defendants out of necessity has been presented, I think ably by the defense. The attempt here by the defense is to determine whether these individuals are to be exonerated from a violation of the law because they believe that something was occurring under the circumstances which have been referred to in the brief, that a crime is being committed because indeed life begins at the point of conception.

Recognizing the fact that the State of Virginia, as late as 1975, I think, has passed a statute which permits the abortions to occur during the first trimester of pregnancy, the Court then is put to the test of determining what was in the minds of these respective defendants on this particular day at this particular situation.

Each one of the defendants, I think, who has testified here today, certainly is well aware I think generally of the law as it exists with respect to abortions as such. Certainly, each one has very stringently stated their particular positions with respect to what they individually and personally feel with respect to when life begins and whether they were in fact there for the purpose of saving a life.

Mr. Kilcarr, I certainly agree with you that the testimony of your client rather succinctly stated how she felt, that there was no one else there to protect this particular child.

It is not the prerogative [sic] of the Court to inject my own individual thoughts. As a matter of fact, it is necessary for me to totally extract them from this particular issue.

While I recognize the fact that I am not trying an abortion case as such, I am trying a trespass case. I am trying a case involving the common law defense of necessity as such.

When I look at the evidence which has been presented to the Court at this particular time, I have to decide the case on the basis of that evidence, that evidence being specifically, number one, the testimony of Dr. Enos as to when does life begin as such. Dr. Enos, I think has testified from his professional opinion as a recognized pathologist, an expert in medical testimony, that it begins from the moment of conception. His testimony certainly has been verified from the film which was shown by counsel for the defendants which he adopted as being his medical opinion.

The next issue before the Court then I think since that has been proved to the Court at this particular time is what did these individual defendants feel at that particular time.

Were they compelled indeed to go there for the purposes of saving a life as such?

Mr. Merril argues, and the Court has a great deal of concern about extending any type of doctrine which would permit as he says a religious sect, and I will say specifically for instance, such as Jehovah's Witnesses to go into a hospital for the purpose of stopping a transfusion because they simply do not believe that. I do not think that that is proper. I must, however, determine the case on its particular facts as it is presented at this particular time.

Did these defendants then, number one, believe as Dr. Enos has testified before the Court, that life begins at conception? Believing that they did, did they know that they had to go out of necessity to stop what they considered to be a crime from being comitted and therefore saving a particular life as such? I think they did.

The charges against each defendant are dismissed. My opinion is restricted to this case only and should not be construed to apply to any other set of circumstances whatsoever.

(Whereupon, at 4:45 p.m., the hearing in the above-entitled matter was concluded.)

see 80

884